In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 885

CORO, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR THE COMMISSION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-11a) is reported at 338 F. 2d 149. The opinion and order of the Federal Trade Commission (App. Pet. 43a-72a)[1] have not been officially reported.

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[1] "App. Pet." refers to the Appendix to the Brief for Petitioners filed in the court of appeals; "App. Resp." refers to the Appendix to the Brief for Respondents filed in the court below.

JURISDICTION

The decree of the court of appeals modifying the Commission's order and enforcing the order as modified was entered on November 10, 1964.[2] The petition for a writ of certiorari was filed on February 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Commission's order prohibiting petitioner from engaging in fictitious pricing practices throughout its business was justified by the finding that petitioner had engaged in such illegal practices in its sales to catalog houses.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, provides, in pertinent part:

> (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

STATEMENT

Petitioner is a New York corporation engaged in the manufacture, importation and sale of costume jewelry, watches and other products (App. Pet. 44a). It sells primarily to department and variety stores, but during the years 1956 through 1960 petitioner also sold a special line of jewelry and watches—not

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[2] The judgment of the court below, not reproduced in the petition for a writ of certiorari, is set forth in the appendix to this brief, *infra*, p. 10.

available to its other customers—to so-called "catalog houses" which resell by means of widely-distributed catalogs (App. Pet. 45a, 89a, 99a).[3]

In connection with its catalog house sales, petitioner furnished its customers with catalog insert pages which described, and in some instances illustrated (through photographic transparencies), petitioner's products. These inserts stated a price which purported to represent the usual retail price charged for the product in the area, but which was, in fact, twice the price at which the article was actually sold by the catalog houses. The true price was indicated to the catalog subscriber in the code number for the article, the meaning of which was revealed by a key in the catalog (App. Pet. 45a-47a, 89a; App. Resp. 11b-12b, 13b, 23b, 27b-28b, 33b, 39b, 43b-45b, 51b). Since the merchandise in question was sold exclusively to the catalog houses, no usual retail price existed for the products, and the fictitious retail price set out by petitioner was arrived at by simply tripling the cost of the product to the catalog house (App. Pet. 46a-47a, 52a, 94a-95a, 104a, 119a-120a).[4]

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[3] The catalogs, offering a variety of products for sale, are distributed to individuals and organizations, who purchase articles from the catalog for their own use and consumption, and occasionally are distributed to retailers who purchase for resale (App. Pet. 9a, 53a, 96a, 119a-120a).

[4] The Commission illustrated this practice with the "Nancy" necklace and earring set, which the catalog sheet referred to as follows:

> Nancy . . . Necklace and Earrings. 7483/02C825 2-Pc. set $16.50. [App. Pet. 45a; App. Resp. 11b-12b, 44b.]

The $16.50 price was the fictitious price suggested by peti-

Petitioner altered its method of suggesting prices in 1960. The false list or retail prices were no longer directly supplied on the insert sheets delivered to the catalog houses (App. Pet. 49a-50a, 105a, 107a-108a; App. Resp. 15b, 17b-18b, 48b, 49b-50b); instead, the insert sheets were now accompanied by a letter from petitioner, stating in part: "On the basis of past experience, we can advise you that catalogs using our insert usually take a mark up of 50% on their cost. Catalogs usually suggest a retail price of double this amount for their dealer" (App. Resp. 50b). Thus, while the actual computation of the fictitious retail price was left to the catalog house, petitioner continued to recommend the "three times cost" method

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tioner. The price at which the catalog house always sold the articles was $8.25, which price was concealed in the code number, but could easily be ascertained by use of a key furnished in the catalog. Invariably, the figures following the last letter in the code indicated the price to the catalog house customer. For example, in the description above, the price of $8.25 follows the letter "C" (App. Pet. 92a-93a, 101a, 119a; App. Resp. 27b-28b, 30b). Petitioner's coding sheet to the catalog houses described the relationship of these prices as follows:

"Key	Number	Item	Jobber cost	Dealer cost	Suggested line
B	7483/02	Nancy 2 pc. set	5.50	8.25	16.50"

"Jobber cost" was petitioner's selling price to the catalog house; petitioner's "Suggested line" was three times the cost to the catalog house; "Dealer cost" was the cost to the ultimate purchaser from the catalog house and was one-half the "Suggested line" (App. Resp. 47b).

for computing the fictitious retail price. Petitioner ceased doing business with catalog houses in December 1960, because of the commencement of the Commission investigation into these practices (App. Pet. 56a, 59a-61a).

The Federal Trade Commission instituted proceedings against petitioner in April 1961 charging it with having placed in the hands of retailers and jobbers the means by which they were able to deceive the purchasing public as to the usual and customary retail prices of various products (App. Resp. 1b-4b).[5] The Commission agreed with the examiner's finding, after full hearing, that petitioner in its catalog sales had engaged in unfair practices in violation of Section 5 of the Federal Trade Commission Act (App. Pet. 52a, 38a). Petitioner was found to have "grossly misrepresented the 'retail' prices of its merchandise" (App. Pet. 52a), misrepresentations that were disseminated in hundreds of thousands of catalogs and generated substantial sales (App. Pet. 54a). A cease-and-desist order was entered, prohibiting petitioner from misrepresenting "the usual and regular retail price of merchandise" on catalog insert sheets "or in any other manner", and from supplying catalog sheets or other material by which the public may be misled about the usual and regular prices for its merchandise (App. Pet. 71a-72a).

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[5] Petitioner was also charged with misrepresenting in its catalog inserts that its watches were unconditionally guaranteed (App. Resp. 3b). The Commission's order required petitioner to discontinue this deceptive practice (App. Pet. 72a). Coro did not challenge that part of the Commission's order before the court of appeals and does not challenge it here.

The court of appeals held that the Commission properly issued an order against petitioner Coro, despite its abandonment of catalog sales, and that the scope of the order was within the Commission's discretion (Pet. 1a-10a). The court modified the Commission's order to eliminate reference to one of petitioner's officers, and, as thus modified, the court affirmed and enforced the order (Pet. 10a-11a).[6]

ARGUMENT

Petitioner's principal complaint is that the Commission's order is too broad because it prohibits fictitious pricing throughout petitioner's business even though its unlawful acts had been limited to sales to catalog houses. The contention was correctly rejected by the Commission and by the court of appeals. Further review by this Court is not warranted.

Petitioner concedes that it engaged in unlawful practices in sales to catalog houses (Pet. 8). It contends that catalog sales were a small portion of its business and were abandoned in 1960. However, petitioner gave up catalog sales only in response to the Commission's investigation and there is nothing to prevent it from resuming, since it is continuing in its regular business of selling watches and costume jewelry (Pet. 9a; App. Pet. 59a-61a). Under these

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[6] The Commission had named petitioner's president as a respondent in the order along with the company (App. Pet. 66a-69a) and a final order was entered accordingly (App. Pet. 70a-72a). The court of appeals held that the hearing examiner was correct in dismissing the complaint against the president, and the court modified the Commission's order by deleting the reference to him (Pet. 10a-11a).

circumstances, cessation of the unlawful practices deserves little weight (*Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977, 987 (C.A.D.C.); *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 330 (C.A. 7), certiorari denied, 323 U.S. 730), and the Commission "would not be justified in relying upon a mere promise not to engage in these practices" (*Moir* v. *Federal Trade Commission*, 12 F. 2d 22, 27 (C.A. 1)).[7]

So, also, the violations found in this proceeding afforded sufficient basis for the Commission's concern that petitioner might engage in similar fictitious pricing practices in its other sales. The Commission properly concluded that "fictitious pricing, in all of its myriad forms, is but a single 'practice' " and an order confined to "one of several means of engaging in a particular unlawful practice * * * invite[s] ingenious attempts to circumvent it" (App. Pet. 65a). As this Court has held, the Commission "is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past", but may "close all roads to the prohibited goal * * *"

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[7] The court of appeals properly held that it is within the Commission's discretion to determine whether a cease and desist order is needed to make certain that a trade practice it has found unlawful will be stopped and not resumed (Pet. 8a). To this effect, *Giant Food, Inc.* v. *Federal Trade Commission*, 322 F. 2d 977, 986-987 (C.A. D.C.); *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838, 841 (C.A. 7), certiorari denied, 368 U.S. 952; *Automobile Owners Safety Insurance Company* v. *Federal Trade Commission*, 255 F. 2d 295, 298 (C.A. 8), certiorari denied, 358 U.S. 875; *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F. 2d 7, 13 (C.A. 2).

Federal Trade Commission v. *Ruberoid Co.*, 343 U.S. 470, 473; *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392-393. See, also, *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608; *Federal Trade Commission* v. *Broch & Co.*, 368 U.S. 360, 364.[9] The scope of the instant order's prohibition against fictitious pricing accomplished by "catalog insert sheets * * * or in any other manner" (App. Pet. 71a) is precisely the same as that approved in *Baltimore Luggage Co.* v. *Federal Trade Commission*, 296 F.2d 608, 610 (C.A. 4), certiorari denied, 369 U.S. 860, prohibiting misrepresentations of the usual retail price "by means of pre-ticketing or in any other manner."[9]

Contrary to petitioner's contention (Pet. 16-18), the decision below is not in conflict with decisions of the Second Circuit. The cases cited in the petition involved acts and practices wholly dissimilar from those found in the instant proceeding.[10] That other

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[9] Petitioner's reliance on *Broch* is misplaced (Pet. 14-15). To be sure, the Court indicated that, under certain circumstances, the "generalized language" of the order might not withstand scrutiny, 368 U.S. at 367, but that statement is not relevant here, since petitioner objects to the scope rather than any alleged vagueness of the instant order (Pet. 2).

[9] Provisions very nearly identical to those in paragraphs 3 and 4 of the instant order—complained of by petitioner (Pet. 7-8)—were also affirmed in the *Baltimore Luggage* decision, *supra*.

[10] Thus, *Swanee Paper Corporation* v. *Federal Trade Commission*, 291 F. 2d 833 (C.A. 2), involved a violation of Section 2(d) of the Clayton Act, 15 U.S.C. 13(d) which prohibits suppliers of commodities from making payments for the benefit of a customer unless the payment is available on

orders, in different contexts, have been held too broad does not indicate a disagreement among the courts of appeals with respect to the permissible scope of the order challenged here.

CONCLUSION

The decision of the court below is correct. There is no conflict of decisions or other compelling reason for review by this Court. The petition for writ of certiorari should be denied.

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equal terms to all other competing customers of the supplier. The court objected to the breadth of the order since it "is not even limited to related activities but enjoins Swanee from violating Section 2(d) in the very words of the statute", *id.* at 838. The court modified the orders in *Grand Union Co.* v. *Federal Trade Commission*, 300 F. 2d 92, 100-101 (C.A. 2) and *American News Co.* v. *Federal Trade Commission*, 300 F. 2d 104, 111 (C.A. 2), certiorari denied, 371 U.S. 824, because they forbade certain practices which neither the Commission nor the courts had previously declared unlawful.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6267.

CORO, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

DECREE

November 10, 1964.

This cause came on to be heard upon petition for review of an order of the Federal Trade Commission, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the Federal Trade Commission of November 6, 1963, is hereby modified by deleting therefrom reference to Gerald E. Rosenberger individually, and as so modified said order is affirmed and enforced.

By the Court:

/s/ Roger A. Stinchfield
Clerk.

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